

# Appendix B

## DISCUSSION OF TRUST MANDATE

The department, as trust manager, often finds itself between two competing interests. The timber industry sometimes claims that any action the department takes beyond complying with the minimum legal requirements violates a trust duty to maximize revenue for trust beneficiaries. Some state agencies, tribes and environmental groups believe the department, as manager of state forest lands, has a higher "duty" than maximizing revenue and should be held to a higher standard of stewardship. Neither point of view reflects a complete understanding of the department's duties and practices.

The question of balancing greater environmental protection and trust income should be approached from four perspectives: 1) the prudent person doctrine; 2) undivided loyalty to the trust beneficiaries; 3) intergenerational equity (as opposed to maximizing current income), and 4) the problem of foreclosing future options.

## THE PRUDENT PERSON DOCTRINE

Trust managers are legally required to manage a trust as a prudent person, exercising such care and skill as a person of ordinary prudence would exercise in dealing with his or her own property. In the department's view, this means, among other things, avoiding undue risk, avoiding tortious acts, etc.

The beneficiaries need a predictable timber sales program that can be executed over several years. Constantly changing regulations often add to administrative overhead. Sales prepared under one set of regulations, for example, may be harvested under a different and more stringent set. These changes (between the time of preparation and the time of harvest) cause contract disputes with purchasers and may force the department to modify planning decisions, thus adding to administrative overhead and causing further delays.

The department believes it is in the best interest of the beneficiaries to manage the trusts in a manner that will avoid the type of controversy that has surrounded forest practices in the last few years. These types of controversies (such as the federal listing of the northern spotted owl as a threatened species) usually result in ever more restrictive regulations. In the department's opinion, public concerns regarding wildlife, fisheries and water quality are likely to escalate and may result in more stringent regulations if the public perceives that the department and other public land managers are not considering nontimber resources.

The department believes it is in the best interests of the trust beneficiaries over the long run to:

- Manage state forest land to prevent the listing of additional species as threatened or endangered.
- Prevent public demand for ever-increasing, restrictive regulations of forest practices.
- Avoid the resulting contract disputes and uncertainty.

That is why the department has, in certain policies, retained the freedom to exceed existing Forest Practices Act regulations if necessary to protect a public resource on state forest land.

Policy No. 30 (Silviculture Activities), for example, allows the department in cases "warranting special attention" to accept a reduction in current income or return on investment if necessary to provide extra protection for public resources.

## UNDIVIDED LOYALTY

The department believes that the common law requirement of undivided loyalty to trust beneficiaries is fundamental. This principle requires that trust land and its assets not be diverted to benefit others at the expense of the trust beneficiaries without compensation. There is, however, no requirement to avoid providing others with collateral benefits. The trustee simply must make all decisions with the beneficiaries' interest first and foremost in mind.

For example, the timing, sequence, unit size and spatial distribution of timber sales may be modified to benefit wildlife, water quality or fisheries without violating the principle of undivided loyalty. Managing trust assets principally to provide wildlife habitat, however, would violate that principle.

Another example is Policy No. 6 (Western Washington Ownership Groups). In the past, the department computed harvest levels for Forest Board Transfer lands in Western Washington by consolidating all 16 counties into one, large ownership group. The department now intends to calculate harvest levels on Forest Board Transfer land by individual county.

This change is beneficial to local communities and to the department as well, but over the long run it is revenue neutral to the trusts. The change, as proposed by the department, is permissible under the undivided loyalty standard.

On the other hand, allotting a portion of the timber for local purchasers, who can only pay a lower price than full market value, would benefit some hard hit, timber-dependent communities but would do so at the expense of the trust beneficiaries and would therefore violate the principle of undivided loyalty.

## INTERGENERATIONAL EQUITY VERSUS MAXIMIZING CURRENT INCOME

The department believes this issue is frequently misunderstood. Nothing in trust law (statutory or common law) requires the department to maximize current income. Common law requires that a trustee make trust property productive without unduly favoring present beneficiaries over future beneficiaries.

Most of the criticism of the Forest Resource Plan on this issue is based on the timing of income, not the amount. The policies that defer harvest for a variety of reasons, particularly those related to the northern spotted owl, and the "off-base policies," have attracted the most concern. The department, however, believes these policies are consistent with its trust duties.

Policy No. 4 (Sustainable, Even-Flow Timber Harvest) is an example of providing for intergenerational equity. The policy requires the department to manage state forest land to produce a sustainable, Even-Flow harvest of timber. It prevents major fluctuations between decade harvest levels and prevents the department from favoring one generation of beneficiary over another.

The trusts include the entire forest ecosystem and are perpetual. The department, as trustee, must therefore manage the trusts to ensure equal treatment for all generations. Setting a rotation age for timber at 40 or 50 years, for example, would prefer the present generation over the future. It would result in high harvest levels in early years and much lower levels in future years. On the other hand, setting the rotation age at 100 years or more would severely reduce harvest levels for the first few decades, and depending on the age selected, either reduce the total harvest at all times, or else result in a higher level of harvest in 80 years.

Modest deferrals (the 19,400 acres proposed in the plan) represent about one (1) percent of state forest land. These deferrals help maintain the department's future options.

## FORECLOSING FUTURE OPTIONS

The department does not know all the ways there are to generate income from state forest lands. The department believes it is prudent to manage these trust assets so that at least reasonably foreseeable future sources of income are not foregone by actions taken today.

Policy No. 8 (Special Forest Products), for example, which encourages the department to market and sell specialty products from state forest land, illustrates the point. Some products, now thought to be of little value, may have substantial value in the future and may help generate substantial income for the trusts.

Another example is Policy No. 13 (Special Ecological Features). The policy requires the department to identify state forest lands with special ecological features, and to seek legislation and funding to remove these lands from trust ownership. In the past, funds appropriated from the legislature for this purpose have allowed the department to set aside properties as Natural Resources Conservation Areas. See Appendix E for a list of these properties.

In 1988 and 1989, for example, the legislature appropriated \$151.5 million to purchase special lands from the trusts. These properties were removed from trust ownership and placed in protective status. A portion of the funds were put in the common school construction fund for the appraised value of the timber. With the remaining funds, the department purchased productive replacement forest land to maintain the state forest land base. The department expects this type of program to continue in the future. The purchases illustrate the range of future options available to the department.

Policy No. 15 (The Genetic Resource) also illustrates this principle. The policy requires the department to consider the genetic resource on state forest lands as a trust asset. As one part of the overall strategy, the department has deferred indefinitely from harvest about 2,417 acres of gene pool reserves (native seed sources). These reserves have been removed from the commercial harvest base to ensure that native genetic material, well adapted to local conditions, will be available to the department in the future.

To preserve future options, the department must also avoid actions that are likely to have a negative impact on long-term productivity of trust lands. Although the department believes its staff knows a good deal about forest productivity, it does not have all the answers. The policies in the Forest Resource Plan reflect a prudent and conservative management approach which will allow the department to harvest timber on a sustainable, even-flow but still protect the range of public resources found on state forest lands.

